A

CHAN WEI LOON v. PP & ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
ZALEHA YUSOF FCJ
HASNAH MOHAMMED HASHIM FCJ
B
[CRIMINAL APPEAL NOS: 05(M)-145-06-2018(N)
& 05(M)-146-06-2018(N)]
6 MAY 2021

C ***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – Accused persons charged with two counts of drug trafficking – Accused persons convicted, found guilty and sentenced to death – Machines and drugs found in shop house and house – House allegedly used to store drugs purportedly manufactured in shop house – Whether elements of charge proven – Whether prima facie case established – Whether accused persons manufacturing drugs when arrested –* D *Whether defence probable – Whether conviction and sentence safe – Dangerous Drugs Act 1952, ss. 2 & 39B(2)*

CRIMINAL LAW: *Penal Code – Section 34 – Common intention – Offence of trafficking in drugs – Accused persons convicted, found guilty and sentenced to death – Machines and drugs found in shop house and house – House allegedly used to* E *store drugs purportedly manufactured in shop house – Whether conviction and sentence safe – Dangerous Drugs Act 1952, ss. 2 & 39B(2)*

The appellants were each charged at the High Court with two counts under s. 39B(2) of the Dangerous Drugs Act 1952 ('DDA'), read together with s. 34 of the Penal Code, for the offence of drug trafficking, said to have taken F place at a double-storey shop house ('shop house') ('first charge') and a double-storey house ('house') ('second charge') ('charges'). The prosecution's narrative disclosed that, acting upon information received, a team of police officers had positioned themselves near the shop house. The second appellant was seen opening the door of the shop house before entering with the first G appellant. The police then forcefully entered the premises and arrested the appellants on the ground floor. Powdery substances, various machines suspected of being used to manufacture drugs and thousands of pills were found in the shop house. On the same day, the police had also raided the house rented by the first appellant. There, 26,543g of Nimetazepam and 348 H pieces of Eramin 5 pills were found and seized. A chemist, who visited the shop house at the request of the police, confirmed that the machines were used to manufacture Eramin 5 pills. At the end of the prosecution's case, the trial judge, satisfied that the prosecution had established a *prima facie* case against the appellants in respect of the charges, ordered the appellants to enter I their defence. In their defence, the appellants submitted that (i) they were business partners; (ii) after entering into a tenancy agreement to rent the shop

house, the appellants only occupied the upper floor while the ground floor was sublet to one Ah Gu; (iii) Ah Gu and his friends, with the help of the appellants, moved in various machines into the shop house to start his business of producing men's supplements; (iv) the appellants never entered the ground floor once Ah Gu's business went fully operational. The ground floor was closed most of the time and the access card the appellants had could only open the grille door of the shop house and not the ground floor of the same; (v) the first appellant also offered Ah Gu and the latter's friend ('Ah Weng') to stay with him at the house since there were vacant rooms; (vi) the appellants took the master bedroom while Ah Gu and his girlfriend and Ah Weng occupied the other rooms; (vii) on the day of the incident, the appellants were arrested on the upper floor of the shop house; and (viii) the machines and powdery substances belonged to Ah Gu. At the end of the defence's case, the trial judge found that the appellants failed to raise any reasonable doubt on the prosecution's case and failed to rebut the presumption under s. 37(b) of the DDA invoked against them in both charges on the balance of probabilities. The appellants were found guilty of the charges and sentenced to death. Upon appeal, the Court of Appeal affirmed the decision of the High Court on the first charge against the appellants and the second charge against the first appellant but acquitted and discharged the second appellant on the second charge. Hence, the present appeals.

Held (acquitting and discharging appellants on first charge; ordering accordingly for second charge)
Per Zaleha Yusof FCJ delivering the judgment of the court:

(1) If a person is charged with manufacturing dangerous drugs, it is the duty of the prosecution to prove that, at the time of the police raid, the accused person was in action, namely, engaged in the acts of 'manufacture' as defined by s. 2 of the DDA *ie*, he was in the act of producing, making or refining drugs. The evidence of such act must be there. The appellants were 'clean' at the time of their arrest; there were no traces of drugs found on their persons, nails nor the clothes that they were wearing. There was also no evidence of the processing of the drugs. Therefore, there existed no nexus between the appellants and the act of 'manufacturing'. (paras 77, 90 & 94)

(2) The prosecution submitted that the appellants were arrested on the ground floor while the defence's story was that they were arrested on the upper floor. The police report made by the prosecution witness, police officer SP14, was in contradiction with his answers during examination-in-chief and cross-examination. The address in the original charge itself was 'Lot 185-1' which was the address of the upper floor of the shop house before it was amended much later to 'Lot 185'. There was grave doubt on the question of whether the appellants were arrested on the first or ground floor of the premises and the benefit of the doubt ought to be resolved in favour of the appellants. (paras 79, 80, 87 & 88)

(3) The fact that the appellants carried a few of the machines into the shop house explained how their fingerprints were found on some of the machines. There were many of others too; there were multiple fingerprints of unknown individuals found on several machines which could not be traced in the police database. Therefore, that could not point to an irresistible inference that the appellants manufactured dangerous drugs in the premises. Their conduct of running towards the police upon arrest also did not point to their guilt as, if you do something wrong, you would definitely run away from the police; not towards them. (paras 92 & 94)

(4) The conviction on the first charge was unsafe. The appeal of the appellants on the first charge was allowed and the conviction was quashed. The sentence of death was also set aside. The appellants were acquitted and discharged on the first charge. (para 96)

(5) As the house in the second charge was purportedly used to store the drugs purportedly manufactured by the first appellant, if the first charge against the first appellant failed, then the second charge must also fail. The second charge against the second appellant must be reduced to mere possession. Therefore, on the second charge, the conviction was quashed, the sentence of death under sub-s. 39B(2) of the DDA against the second appellant was set aside and substituted with an offence punishable under sub-s. 12(3) of the DDA. The second appellant was sentenced to imprisonment for a period of five years. (paras 98 & 99)

Bahasa Melayu *Headnotes*

Perayu-perayu masing-masing dituduh di Mahkamah Tinggi dengan dua pertuduhan bawah s. 39B(2) Akta Dadah Berbahaya 1952 ('ADB'), dibaca bersama-sama s. 34 Kanun Keseksaan, atas kesalahan mengedar dadah, yang dikatakan berlaku di sebuah rumah kedai dua tingkat ('rumah kedai') ('pertuduhan pertama') dan sebuah rumah dua tingkat ('rumah') ('pertuduhan kedua') ('pertuduhan-pertuduhan'). Naratif pihak pendakwaan mendedahkan bahawa, bertindak atas maklumat yang diterima, satu pasukan polis telah mengambil kedudukan berdekatan di rumah kedai. Perayu kedua dilihat membuka pintu rumah kedai sebelum memasukinya bersama-sama perayu pertama. Pihak polis kemudian memasuki premis tersebut secara paksa dan menahan perayu-perayu di tingkat bawah. Bahan serbuk, pelbagai mesin yang disyaki digunakan untuk membuat dadah dan ribuan pil dijumpai di dalam rumah kedai tersebut. Pada hari yang sama, pihak polis juga menyerbu rumah yang disewa oleh perayu pertama. Di situ, 26,543g Nimetazepam dan 348 biji pil Eramin 5 ditemukan dan dirampas. Ahli kimia, yang melawat rumah kedai tersebut atas permintaan pihak polis, mengesahkan mesin-mesin di situ diguna untuk menghasilkan pil Eramin 5. Pada penutup kes pihak pendakwaan, hakim bicara, berpuas hati pihak pendakwaan telah

membuktikan kes *prima facie* terhadap perayu-perayu berkenaan pertuduhan-pertuduhan, memerintahkan perayu-perayu membela diri. Dalam pembelaan mereka, perayu-perayu menghujahkan (i) mereka adalah rakan kongsi; (ii) selepas memasuki perjanjian sewaan untuk menyewa rumah kedai, perayu-perayu hanya menghuni tingkat atas manakala tingkat bawah disewakan pada seorang bernama Ah Gu; (iii) Ah Gu dan rakan-rakannya, dengan bantuan perayu-perayu, memindah masuk pelbagai mesin ke dalam rumah kedai untuk memulakan perniagaannya iaitu menghasilkan ubat kuat lelaki; (iv) perayu-perayu tidak pernah menjejakkan kaki ke tingkat bawah sebaik sahaja perniagaan Ah Gu beroperasi sepenuhnya. Tingkat bawah biasanya ditutup dan kad akses perayu-perayu hanya boleh membuka pintu gril rumah kedai dan bukan tingkat bawah; (v) perayu pertama juga mempelawa Ah Gu dan rakannya ('Ah Weng') untuk tinggal bersama-samanya di rumah kerana terdapat bilik-bilik kosong; (vi) perayu-perayu menghuni bilik utama manakala Ah Gu dan teman wanitanya dan Ah Weng menghuni lain-lain bilik; (vii) pada hari kejadian, perayu-perayu ditahan di tingkat atas rumah kedai; dan (viii) mesin-mesin dan bahan-bahan serbuk dimiliki oleh Ah Gu. Pada penutup kes pembelaan, hakim bicara mendapati perayu-perayu gagal membangkitkan apa-apa keraguan munasabah terhadap kes pendakwaan dan gagal menyangkal anggapan bawah s. 37(b) ADB yang dibangkitkan terhadap mereka dalam kedua-dua pertuduhan atas imbangan kebarangkalian. Perayu-perayu didapati bersalah atas pertuduhan-pertuduhan dan dijatuhkan hukuman mati. Atas rayuan, Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi untuk pertuduhan pertama terhadap perayu-perayu dan pertuduhan kedua terhadap perayu pertama tetapi melepas dan membebaskan perayu kedua terhadap pertuduhan kedua. Maka timbul rayuan-rayuan ini.

Diputuskan (membebaskan dan melepaskan perayu-perayu daripada pertuduhan pertama; memerintahkan sewajarnya untuk pertuduhan kedua)

Oleh Zaleha Yusof HMP menyampaikan penghakiman mahkamah:

(1) Jika seseorang dituduh membuat dadah berbahaya, pihak pendakwaan berkewajipan membuktikan, semasa serbuan polis, tertuduh sedang melakukannya, iaitu melakukan tindakan-tindakan 'manufacture' seperti yang ditafsir oleh s. 2 ADB iaitu dia sedang membuat, menghasilkan atau menghalusi dadah. Keterangan tindakan sedemikian mestilah ada. Perayu-perayu 'bersih' semasa ditahan; tiada kesan dadah pada badan mereka, kuku mahupun pakaian yang mereka pakai. Tiada juga keterangan pemprosesan dadah. Oleh itu, tiada pertalian antara perayu-perayu dan tindakan 'manufacturing'.

(2) Pihak pendakwaan menghujahkan bahawa perayu-perayu ditahan di tingkat bawah manakala naratif pembelaan adalah mereka ditahan di tingkat atas. Laporan polis yang dibuat oleh saksi pendakwaan, pegawai polis SP14, bercanggah dengan jawapannya semasa pemeriksaan utama dan pemeriksaan balas. Alamat dalam pertuduhan asal sendiri ialah 'Lot 185-1' iaitu alamat tingkat atas rumah kedai sebelum lewat dipinda menjadi 'Lot 185'. Terdapat keraguan serius sama ada perayu-perayu ditahan di tingkat atas atau bawah premis dan manfaat keraguan diselesaikan berpihak pada perayu-perayu.

(3) Fakta bahawa perayu-perayu mengangkat beberapa mesin ke dalam rumah kedai menjelaskan bagaimana cap jari mereka dijumpai pada beberapa mesin. Terdapat banyak orang lain juga; wujud beberapa cap jari individu-individu yang tidak dikenali yang dijumpai pada beberapa mesin yang tidak boleh dikesan dalam pangkalan data polis. Oleh itu, tidak boleh disimpulkan bahawa perayu-perayu membuat dadah berbahaya di premis. Tindakan mereka yang berlari ke arah pihak polis semasa tangkapan juga tidak menunjukkan kebersalahan mereka kerana, jika seseorang itu melakukan kesalahan, dia pasti melarikan diri dari pihak polis; bukan ke arah pihak polis.

(4) Sabitan pertuduhan pertama tidak selamat. Rayuan perayu-perayu terhadap pertuduhan pertama dibenarkan dan sabitan dibatalkan. Hukuman mati juga diketepikan. Perayu-perayu dilepaskan dan dibebaskan daripada pertuduhan pertama.

(5) Oleh kerana rumah dalam pertuduhan kedua dikatakan diguna untuk menyimpan dadah yang didakwa oleh perayu pertama, jika pertuduhan pertama terhadap perayu pertama gagal, maka pertuduhan kedua juga semestinya gagal. Pertuduhan kedua terhadap perayu kedua mesti dikurangkan menjadi setakat milikan. Oleh itu, untuk pertuduhan kedua, sabitan dibatalkan, hukuman mati bawah sub-s. 39B(2) ADB terhadap perayu kedua diketepikan dan diganti dengan kesalahan bawah sub-s. 12(3) ADB. Perayu kedua dijatuhkan hukuman penjara lima tahun.

Case(s) referred to:

Lee Boon Siah & Ors v. PP [2014] 3 CLJ 584 CA ***(refd)***
Lim Son Heng v. PP [2014] 1 LNS 414 CA ***(refd)***
Mohan Singh Lachman Singh v. PP [2002] 3 CLJ 293 CA ***(refd)***
Ong Hooi Beng & Ors v. PP [2015] 1 LNS 63 CA ***(refd)***
Ooi Hock Kheng v. PP [2014] 1 LNS 685 CA ***(refd)***
People of the State of Michigan v. Ronald Wayne Mashell 265 Mich App 616 ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(refd)***
PP v. Lee Eng Kooi [1993] 2 CLJ 534 HC ***(refd)***

PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
R v. Farir Crim. LR 745 ***(refd)***
US v. Brooks 438F. 3d 1231 (2006) ***(refd)***
US v. Chesher 678R 2d 1353 (1982) ***(refd)***
US v. Lewis 621 F 2d 1382 (1980) ***(refd)***
US v. Sullivan 919 R. 2d 1403 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112(5)
Dangerous Drugs Act 1952, ss. 2, 12(3), 37(b), (da), 39B(1)(c), 39B(2), First Schedule
Evidence Act 1950, s. 32(1)(i)

For the 1st appellant - Kee Wei Lon & Low Wei Loke; M/s Low
For the 2nd appellant - Ramkarpal Singh & Harshaan Zamani; M/s Karpal Singh & Co
For the respondent - Mohd Dusuki Mokhtar & Nahra Dollah; DPPs

[Editor's note: For the Court of Appeal judgment, please see Chan Wei Loon & Anor v. PP [2018] 1 LNS 709 (overruled).]

Reported by Najib Tamby

JUDGMENT

Zaleha Yusof FCJ:

[1] In the High Court at Seremban, Chan Wei Loon, the appellant in appeal No: 05(M)-145-06-2018(N), (first appellant), and Lai Kar Meng, the appellant in appeal No: 05(M)-146-06-2018(N), (second appellant) (collectively referred to herein as the appellants) were charged on two charges of drug trafficking under the Dangerous Drugs Act 1952 (DDA 1952).

[2] The High Court found the appellants guilty of both charges and had sentenced the appellants to death.

[3] The appellants appealed to the Court of Appeal. The Court of Appeal unanimously dismissed the first appellant's appeal and affirmed his conviction and sentence on both charges. The appeal by the second appellant was also dismissed in respect of the first charge. However, the Court of Appeal allowed the second appellant's appeal against conviction and sentence on the second charge. Therefore, the second appellant was acquitted and discharged on the second charge.

[4] Thereby the appeal before us, by the first appellant against conviction and sentence on both charges; and by the second appellant, against conviction and sentence on the first charge. The Public Prosecutor (the respondent) did not appeal against the decision of the Court of Appeal in acquitting and discharging the second appellant on the second charge.

[5] To appreciate the issue, we shall now lay out the background facts leading to the charges, as encapsulated by the Court of Appeal, with slight modifications.

The Case For The Prosecution

The First Charge

[6] Acting upon information received, in the early hours on 23 October 2010, SP14 (ASP Nik Ezanee bin Mohd. Faizal) with a team of police officers, raided a two-storey shop house at No: 185, Jalan Haruan 5/6, Kawasan Komersil Oakland, Seremban ('the said shop house'). He divided his men into four teams wherein he headed the first team; Insp. Basri bin Husin (SP33) led the second team, SI Halim headed the third team; and Sjn Mustapha was head of the fourth team. Each of the teams was assigned with specific roles.

[7] Upon arrival at the said shop house, the teams took their respective positions assigned to them. SP14 and his group positioned themselves at about 20 meters away from the said premises, facing the front portion of the said shop house.

[8] At about 8.50am, SP14 saw a black coloured KIA motorcar bearing the registration number NBM 3614 ('the said car') stopped in front of the said shop house. Both the driver and sole passenger of the said car exited the car and walked towards the said shop house. He identified the first appellant as the driver of the said car. The first appellant was wearing glasses and had a sling bag slung across his shoulders. SP14 further identified the second appellant as the passenger of the car, who was earlier seated at the front passenger seat, next to the first appellant.

[9] The said shop house was rented out to the first appellant by its owner, SP12 (Harendran a/l Perisamy), for a period of one year *vide* a tenancy agreement (exh. P129). There was an express prohibition (*vide* cl. 2.7) against subletting, assigning, or part with the legal or actual possession of the said premises or any part thereof to any person or persons except with the prior consent in writing of the landlord SP12.

[10] SP14 saw the second appellant opening the door of the said shop house whereupon both the appellants then entered the premises. About 15 minutes later, both the appellants emerged from the premises and proceeded to pray at the praying alter, located in front of the premises. After they were done, both went back inside the said premises.

[11] The raiding team sprang into action at about 9.30am. Two members from SP14's team broke open the front door of the said shop house and another team proceeded to forcefully enter from the rear door of the said premises. When SP14 and his team rushed into the said shop house, both the appellants ran towards him and his team. It resulted in the arrest of both the appellants in no time.

[12] The premises is a double-storey shop house. Both the appellants were purportedly arrested by SP14 and his team on the ground floor.

[13] SP14 and his team thoroughly examined the said shop house. On the ground floor, he found various types of machines and substance suspected of being used to manufacture illicit drugs and also substance suspected to be drugs in several black coloured plastic bags.

[14] The complete list of machines, powdery substance and other related items seized from both the appellants by SP14, were as itemised in the search list, exh. P181, for the first appellant and search list, exh. P182, for the second appellant.

[15] On 25 October 2010, at about 10.50am, the chemist, Dr Vanitha a/p Kunalan (SP6) visited the said shop house and examined the machines and the various types of substance found therein at the request of the police. At the end of the examination and analysis, she found that the said shop house had been used to process and manufacture 'Eramin 5' pills.

[16] The items found by SP6 were listed by the learned trial judge in para. 20 of her grounds of judgment as follows:

> [20] SP-6 mengesahkan:
>
> (a) Terdapatnya serbuk 'Nimatezepam' ditempat-tempat berikut:
>
> (i) Mesin di ruang tengah premis eksibit P16, dan
>
> (ii) Mesin ketuhar di ruang belakang premis (eksibit P20A)
>
> (b) Bahan-bahan kimia yang diperlukan bagi penghasilan pil tersebut, iaitu:
>
> (i) Cellulose di bahagian tengah premis (eksibit B6A dan B7A);
>
> (ii) Starch (kanji) di bahagian belakang premis (eksibit P162);
>
> (iii) Aspartame di bahagian tengah premis (eksibit P148E);
>
> (iv) Mentol di bahagian ruang tengah premis (eksibit P151A);
>
> (v) Lactose di mesin bahagian ruang tengah Premis (eksibit P16);
>
> (vi) Magnesium strearate di bahagian tengah ruang premis (eksibit P152);

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(vii) Hydropopylmethyl cellulose di bahagian belakang premis (eksibit P160A dan P161A); Dan

(viii) Ethanol di bahagian tengah ruang premis (eksibit P154E)

(c) Pewarna yang telah digunakan untuk penghasilan tablet berwarna oren. Warna oren ini adalah campuran tiga jenis warna, iaitu:

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(i) Erythrozines di bahagian tengah ruang Premis (eksibit P148G);

(ii) Tartrazine di bahagian tengah ruang premis (eksibit P147B dan P147C) dan

(iii) Ponceau 4R di bahagian tengah ruang premis (eksibit P148H).

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(d) Terdapat mesin-mesin yang digunakan dalam penghasilan tablet ini untuk menghasilkan serbuk berwarna oren. Mesin-mesin tersebut adalah seperti berikut:

(i) Mesin di ruang tengah (eksibit P16) bertanda B1 dalam rajah kasar (eksibit P127).

D

Mengikut SP6, mesin ini digunakan untuk mencampurkan dan mengaulkan bahan-bahan ramuan iaitu Nimatezepam, Lactose, Magnesium, Strearate, Cellulose, Menthol, Hydropylmenthl Cellulose, Starch, Aspartame dan 3 pewarna iaitu Tartrzine, Ponceau 4R dan Erythrozine;

E

(ii) Mesin di ruang hadapan premis (eksibit P14) (bertanda A1 dalam rajah kasar).

Mesin ini digunakan selepas mengeluarkan "dough" daripada mesin B1. Mesin ini berfungsi sebagai pembentuk untuk mengeluarkan bahan dan serbuk berwarna oren daripada

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'dough' tersebut.

(iii) Oven di bahagian belakang premis (eksibit P20A dan P20B).

Hasil daripada serbuk oren ini akan dimasukkan ke dalam oven (eksibit P20A dan P20B) menggunakan tray-tray dalam oven tersebut bagi tujuan pengeringan (dalam gambar 40 hingga 43

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(eksibit P5).

(iv) Mesin pengayak di bahagian tengah premis (eksibit B17).

Bahan yang dikeringkan tadi ini akan dimasukkan ke dalam mesin pengayak (gambar 28 hingga 29 (eksibit P5). Tujuannya adalah untuk mengasingkan ketulan dan serbuk berwarna oren.

H

Jadi yang keluar daripada mesin ini adalah serbuk warna oren yang halus.

(v) Mesin di ruang hadapan premis (tandaan A2) (eksibit P.14).

Serbuk halus berwarna oren ini akan dimasukkan ke dalam

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mesin bagi membentuk pil-pil yang berwarna oren. Pil-pil berwarna oren ini mempunyai logo yang sama dengan acuan 'tableting' mesin ini.

(vi) Mesin di bahagian hadapan premis (bertanda C8 eksibit P18).

Mesin digunakan untuk memasukkan pil-pil berwarna oren itu ke dalam kepingan aluminium (gambar 34 (eksibit P5) (eksibit P27a dan P27b) bagi tujuan pembungkusan.

[21] Selepas memeriksa mesin-mesin dan menganalisa bahan-bahan yang ditemui, SP6 telah menyediakan laporan kimia, eks. P24.

[17] Mohd. Helmi b Rasdi (SP4), an assistant mechanical engineer attached with JKR Cawangan Mekanikal, Negeri Sembilan, was also asked by the police to certify the serviceability/operability of the abovesaid machines.

[18] SP4 found the machines he had examined, namely:

(i) machines marked A1 and A2 (exh. P14) as shown in photographs no. 19, 21 and 22 (exh. P5) at the front portion of the shop house;

(ii) machine marked (exh. P16) shown at photographs no. 25 and 26 of exh. P5 and the machine marked B5 (exh. P17) shown at photograph no. 30 of exh. P5 at the middle portion of the said shop house; and

(iii) one machine comprising of two ovens (exh. P20A and P20B) and one set of compressor as shown in photographs no. 30, 33, 34, 37 and 38 of exh. P5, at the rear portion of the said shop house; were all in good condition, serviceable and could be operated upon.

[19] SP14 also seized thousands of orange coloured pills from various places inside the said shop house, on the ground floor in which he later handed them over to the investigating officer, Insp Juliana binti Kassim (SP40). The latter eventually re-marked the exhibits with the markings J1, J2(i), J2(ii), J2(iii), J2(iv), J2(v), J2(vi), J2(vii), J2(viii), J2(ix), J2(x) and J2(xi). In court, the exhibits were marked as P61A, P62, P64A, P65A, P66B, P67A, P68A, P69A, P70A, P72A and P73A respectively.

[20] In her report, SP6 stated that she analysed the said exhibits and found them to contain 20,000.21g of Nimetazepam, the subject matter of the first amended charge, exh. P63. SP6 also confirmed that Nimetazepam is a scheduled drug under the First Schedule of the 'DDA' 1952.

[21] At the end of the prosecution's case, the learned trial judge found that the prosecution had established a *prima facie* case against both the appellants in respect of the first amended charge and both the appellants were ordered to enter their defence.

The Second Charge

[22] On the same day ie on 23 October 2010, at about 2pm, SP33 together with SP34 (D/Corp. Sarbani bin Abdullah) and four other officers raided a house number 861, Jalan S2 D23, Garden City Homes, Seremban 2, Negeri Sembilan ('the said house') upon SP14's instruction.

[23] The said house was purportedly rented by the first appellant commencing from 1 June 2010, from its owner through the services of a housing agent (SP37) *vide* a tenancy agreement, exh. P207. SP38, who was SP37's assistant confirmed that he had taken the first appellant to visit the said house prior to the signing of the tenancy agreement by the landlord and the first appellant. SP38 also confirmed that he had handed the keys of the said house to the first appellant. Both SP37 and SP38 identified the first appellant as the tenant of the said house at the material time of the police raid.

[24] The first appellant was taken by the police to the said house in the said raid.

[25] The said house is a double-storey terrace house. It took about 15 minutes for SP33 and his party to reach the said house from the said shop house that was earlier raided by SP14.

[26] SP33 found the front door of the said house locked. He used the keys retrieved from the first appellant front right trousers pocket to open the said door. Once opened, SP33 entered the said house together with the first appellant and members of his team.

[27] The front door led SP33 and his party to the main hall. At the main hall, SP33 saw and subsequently seized the following exhibits:

(i) one blue drum ('tong') (marked A, exh. P189) containing a transparent plastic packet which further contained white powdery substance ('serbuk putih') (exh. P189A);

(ii) one blue drum (marked A1, exh. P190) containing a transparent plastic packet which further contained white powdery substance (exh. P190A);

(iii) one blue drum (marked A2, exh. P91) containing white powdery substance (exh. P191A);

(iv) one blue coloured box (marked A3, exh. P192) containing 20 pieces of plastic containers (marked A3a, exhs. P193, P194A to P194T).

These exhibits were found at the location marked X in the sketch plan (see exh. P195).

[28] In a room located on the same (ground) floor of the said house, SP33 found and seized a luggage bearing the brand of 'World Proof Polo King' (exh. P197). Inside the said luggage were six plastic packets containing substances suspected to be drugs.

[29] In the master bedroom located on the upper (first) floor of the said house, SP33 seized a green pail (exh.t P85). Inside the pail was a small bottle written with the word 'Bird Nest' (exh. P85A) containing 348 pieces of Eramin 5 pills (exh. P85B).

[30] SP33 also found and arrested a Vietnamese woman (Nguyen Thi Thu Trang), then lying on a mattress in the master bedroom. Investigation revealed that she was a GRO at one of the night spots in town and was taken home by the first appellant for "a little bit of fun". A

[31] There were several clothes seized from the said house. In addition, an Astro bill in the first appellant's name (exh. P237) and the second appellant's passport (exh. P241) and bank account book (exh. P242) were seized from the said house. B

[32] The exhibits and the Vietnamese woman were subsequently brought back to IPD, Seremban and handed over to SP47 (Insp. Mohd. Airul Shukri @ Remy bin Saini), the investigating officer in respect of these seizures from the said house. C

[33] SP47 subsequently re-marked the six packets of suspected drug exhibits recovered from the luggage exh. P197 with the markings R26, R27, R28, R29, R30 and R31 respectively. In court, the said exhibits were marked as exhs. P83A, P83B, P83C, P84A, P84B and P84C respectively. D

Pieces of Eramin 5 pills (exh. P85B) were sent to the chemist, SP6, to identify the nature, contents and weight of the said substances.

[34] SP6 analysed the said exhibits and found them to contain 26,543g of Nimetazepam, the subject matter of the second charge. Her report on this is exh. P82. E

[35] At the time of the commencement of the trial against both the appellants, the Vietnamese woman could no longer be found. Her whereabouts was unknown. The learned trial judge consequently allowed the prosecution's application to admit the Vietnamese woman's statement recorded under s. 112(5) of the Criminal Procedure Code in evidence under s. 32(1)(i) of the Evidence Act 1950. Her Ladyship's reasons in allowing so were set out in her grounds of judgment at paras. 68, 69, 70 and 74. The Court of Appeal were with the learned trial judge and could find no error to invalidate the admission of the said document in evidence, which was marked as exh. D227. F G

[36] The Vietnamese woman stated in exh. D227 that on the night before the incident, she was working as a GRO at Pusat Hiburan Solid Gold, Seremban and had entertained both the appellants until the wee hours of the morning. Finally, she was paid RM300 by the first appellant to sleep with him. Then, she was taken home by the first appellant, with the second appellant tagging along. All the three slept in the same room on the first (upper) floor. There were no other occupants in the said house. She was arrested by the police the next day, still sleeping, in the same room she had slept with the first appellant. H I

A **[37]** At the end of the prosecution's case, the learned trial judge also found that the prosecution had established a *prima facie* case against both the appellants in respect of the second charge and both the appellants were ordered to enter their defence.

The Case For The Defence

B

[38] Both the appellants gave an unsworn written statement from the dock and their defence appeared strikingly identical.

[39] Both the appellants stated that they were engaged in providing alarm and CCTV service business at the said shop house.

C **[40]** The first appellant further stated that he had entered into a tenancy agreement to rent the said double-storey shop house. However, he had sublet the ground floor of the shop house to his old acquaintance, one Ah Gu. Hence, he had only occupied the upper (first) floor to run his business with the second appellant.

D **[41]** The said Ah Gu had earlier examined the ground floor of the shop house where he had come with Ah Kam and Ah Weng before agreeing to rent the ground floor from the first appellant.

[42] Thereupon, the said Ah Gu and his friends started to move in various E types of machines and other related stuff and accessories to start his business. When queried, Ah Gu told both the appellants that he had wanted to produce 'Ubat Kuat Untuk Lelaki'.

[43] Both the appellants stated that they had assisted Ah Gu to carry the machines and other related stuff and had placed them inside the ground floor F of the said shop house and had also been chatting and smoking cigarettes with Ah Gu and his friends there.

[44] The first appellant also offered Ah Gu and Ah Weng to stay with him at the said house (House No. 861, City Homes) since there were vacant rooms in the said house. The Vietnamese woman was Ah Gu's girlfriend.

G **[45]** Ah Gu and his girlfriend occupied one of the rooms on the upper floor while Ah Weng occupied the room next to Ah Gu's room. Meanwhile, the first and second appellants took the master bedroom for themselves.

[46] Both the appellants averred that they had never entered the ground H floor portion of the shop house once Ah Gu's business went fully operational. The said portion was closed most of the time and the access card they both had could only open the grille door of the shop house and not the ground floor of the same.

I

[47] Both the appellants claimed that on the day of the incident, both of them were chatting and doing their own thing on the first (upper) floor of the shop house when the police broke open the door of the first floor and arrested both of them. They insisted that they were arrested on the first floor of the shop house before they were taken down to the ground floor.

[48] Both the appellants also insisted that the police had to forcefully break open the door of the ground floor as no keys to open the said door were available from either of the appellants.

[49] When the door was finally forced open, both the appellants claimed that they saw boxes, drums and powdery substance of unknown origin all over the ground floor. The first appellant claimed that he had told the police that the boxes, drums, machines and powdery substance therein belonged to Ah Gu. However, the police refused to listen.

[50] Both the appellants also denied having knowledge of the drugs seized by SP33 and his team at the said house involving the second charge.

[51] At the end of the defence's case, the learned trial judge found that both the appellants had failed to raise any reasonable doubt in the prosecution's case and had also failed to rebut the presumption under s. 37(b) of the DDA invoked against them in both the charges on the balance of probabilities. Both the appellants were eventually found guilty by the High Court of both the charges and were sentenced to death on both counts.

[52] Aggrieved, the appellants appealed to the Court of Appeal; which as alluded to earlier affirmed the decision of the High Court on the first charge against both the appellants and the first charge against the appellant but acquitted and discharged the second appellant on the second charge.

The Charges

[53] The original first charge against the appellants stated the address of the offence as 'Rumah Kedai Lot 185-1'. However, the address in the original charge was amended on 18 March 2013, after the prosecution had called 16 witnesses. Thus, the two charges against the appellants now read as follows:

> **Tuduhan Pertama (Pindaan):**
>
> Bahawa kamu pada 23hb Oktober 2010, di premis rumah kedai Lot 185, Jalan Haruan 5, 5/6, Pusat Komersial Oakland II, di dalam daerah Seremban, di dalam Negeri Sembilan, dengan niat bersama telah melakukan perbuatan bagi tujuan mengedar dadah berbahaya iaitu Nimetazepam seberat 20,000.21 gram dan dengan itu melakukan suatu kesalahan di bawah seksyen 39B(1)(c) Akta Dadah Berbahaya 1952 (Akta 234) yang boleh dihukum di bawah s.39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

Pertuduhan Kedua:

Bahawa kamu pada 23hb Oktober 2010, lebih kurang jam 2.15 petang, di rumah No. 861, Jalan S2 D23, City Homes di dalam Daerah Seremban, di dalam Negeri Sembilan dengan niat bersama telah mengedar dadah berbahaya iaitu Nimetazepam seberat 26,543 gram dan dengan itu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(b) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama di baca bersama dengan seksyen 34 Kanun Keseksaan.

Our Analysis And Decision

[54] On the first charge, the appellants raised three issues before us, namely possession, double presumptions and access by the third party. However, the main focus was the issue of possession; namely, whether possession is an essential ingredient in a case involving manufacturing of dangerous drugs and thus it needs to be proven before the trafficking definition in s. 2 of the DDA 1952 can be invoked.

[55] On this, the learned trial judge found that the shop house was used as a drug manufacturing factory based upon the seizure of various types of machines, apparatus and chemical substance that can be used to process drugs that were found at the ground floor of the said shop house where both the appellants were arrested. The learned trial judge took the view that it was unnecessary for the prosecution to prove possession in manufacturing cases and the findings on manufacturing is sufficient to prove the offence of trafficking by manufacturing. This can be seen in the following paragraphs in the grounds of judgment of Her Ladyship:

[27] Mahkamah memutuskan berdasarkan keadaan premis yang diserbu yang menjadi kilang/makmal memproses dadah, adalah jelas bahawa OKT-OKT telah melakukan atau menjalankan pengedaran dadah secara terus "direct or actual trafficking."

41. Mahkamah memutuskan memandangkan pihak pendakwaan telah membukti bahawa kedua-dua OKT tersebut memproses/mengilang dadah maka elemen pemilikan adalah tidak perlu dibuktikan. Mahkamah bersandarkan kepada keputusan *Lee Boon Siah v. PP* …

[42] Keputusan kes *Lee Boon Siah* adalah kedudukan undang-undang hari ini iaitu bagi pertuduhan 'manufacturing' pihak pendakwaan tidak perlu membuktikan 'possesion' – milikan. Ini adalah kerana Seksyen 2 memperuntukkan secara khusus definisi perkataan 'manufacture' iaitu termasuk 'making, producing, compiling and assembling of the drug' tidak seperti perbuatan lain yang didefinisikan sebagai 'trafficking'.

[49] Atas isu ini Mahkamah bersetuju dengan hujahan pendakwaan bahawa memandangkan pihak pendakwaan telah berjaya membuktikan premis tersebut adalah mempunyai peralatan memproses/mengilang dadah, maka kedua-dua OKT telah melakukan pengedaran secara terus

– direct trafficking seperti yang telah diputuskan oleh kes *Lee Boon Siah v. PP* (*supra*) di mana pihak pendakwaan tidak perlu membuktikan elemen milikan.

[56] In affirming the decisions of the learned trial judge, the Court of Appeal found as follows:

> [63] In all the circumstances of the case though, the statement stated at para 32 of *Lee Boon Siah v. PP* (*supra*) represents the correct proposition of the law relating to cases involving drug manufacturing. Hence, the learned trial judge did not commit any error of law when she ruled that the ruling in *Lee Boon Siah v. PP* (*supra*) applied unequivocally to the facts of the present case.
>
> [64] It is very important to note that in this instant appeal, the case for the prosecution was not based on custody of control thereby invoking the notion of *mens rea* possession of the said drugs or attracting the presumption of possession and knowledge under s. 37(d) of the DDA or invoking the presumption of trafficking under s. 37(da) of the same Act. Rather, the persecution founded its case of trafficking of the said drugs on 'manufacturing', one of the acts that constitute trafficking within the definition of s. 2 of the DDA.
>
> [67] In our judgement, for the reasons enumerated below, the act of manufacturing dangerous drug is one of those acts of trafficking where the element of possession of the drugs would assume little relevance or no relevance at all.
>
> [71] By its plain and ordinary meaning of 'manufacture' or 'manufacturing' given by renowned dictionaries and by the DDA itself as enumerated above, it appears to us that in essence, it is all about the doing of an act, action, state or occurrence, more specifically the doing or the making of something whether manually or by machines. Hence, in the context of s. 2 of the DDA, what needs to be proven is the making, producing, compounding and assembling of the drug or a preparation of the drug or refining or transformation of the drug into another dangerous drug or any other process done in the course of the foregoing activities. In such event, happening or occurrence, there is no requirement to prove possession of the impugned drugs as the process of making or producing, etc. in itself had excluded the element of possession of the same.

[57] In essence, the Court of Appeal was of the view that possession was not an essential ingredient in a case involving manufacturing of drugs and thus need not be proven before the trafficking definition under s. 2 of the DDA 1952 can be invoked. The learned trial judge did not err in finding that the prosecution had proven that the appellants were engaged in the manufacturing of the impugned drugs and that 'manufacturing' was itself an act of trafficking under s. 2 of the DDA 1952 which did not require possession to be proven. The quantity of drugs manufactured was immaterial

as the act of trafficking was not dependent on the quantity of drugs that was manufactured. Hence, even if only one gram of dangerous drug was manufactured, it was still trafficking and could attract s. 39B of the DDA 1952 into motion.

[58] This view was further reflected in paras. 72 to 74 of the Court of Appeal's ground of judgment. For those reasons, the Court of Appeal was of the view that possession is not an essential ingredient in a case involving manufacturing of drugs and thus it need not be proven before the trafficking definition in s. 2 of the DDA can be invoked.

[59] Mr. Ram Karpal Singh for the second appellant whose oral submission was adopted by Mr. Kee Wei Lon for the first appellant, argued that the High Court and Court of Appeal had erred when they held that it was unnecessary for the prosecution to prove possession in cases of manufacturing. The courts below had relied on *Lee Boon Siah & Ors v. PP* [2014] 3 CLJ 584. However, learned counsel submitted, it is pertinent to note that the Court of Appeal in *Lee Boon Siah*, *supra*, did not consider the question of whether a 'manufacturing' case under s. 2, DDA 1952, requires proof of possession first save for its reliance on the cases of *PP v. Chia Leong Foo* [2000] 4 CLJ 649; [2000] 6 MLJ 705 and *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233; [1996] 3 MLJ 560; when those cases were not "manufacturing" but were instead 'sale' cases under s. 2 of DDA 1952.

[60] Both learned counsel for the appellants submitted that there must be an overt act of "manufacturing" and mere presence in the premises in which the machines were found cannot, in itself, amount to trafficking. The case of *Ooi Hock Kheng v. PP* [2014] 1 LNS 685; [2014] 5 MLJ 585 was cited although it was not a "manufacturing" case but it was submitted that the principle in *Ooi Hock Kheng, supra*, applies equally to "manufacturing" cases; namely, that there must be some overt act of trafficking before a definition under s. 2, DDA 1952 is applied and further, if the drug in question is not listed under s. 37(da), DDA 1952; such as Nimetazepam in this case, there ought to be direct evidence of trafficking or affirmative evidence of trafficking since the presumption of trafficking does not apply.

[61] Mr Ram argued that if mere presence without proof of possession is sufficient to prove the offence of manufacturing, than a security guard who was engaged to guard the premises, and has touched the machine would be found guilty just because of his presence and his fingerprint is found on the machine. This, he said, cannot be the case. He cited cases from the United States (cases of *People of the State of Michigan v. Ronald Wayne Mashell* 265 Mich App 616; *US v. Sullivan* 919 R. 2d 1403; *US v. Lewis* 621 F. 2d 1382 (1980); *US v. Chesher* 678R. 2d 1353 (1982) and *US v. Brooks* 438F. 3d 1231 (2006) and a case from the United Kingdom (*R v. Farir*) Crim. LR 745 to show that in other jurisdictions, possession and overt acts need to be proven in manufacturing of drugs cases.

[62] On the other hand, the prosecution took the stand that possession is not an essential ingredient in a trafficking case involving manufacturing of drug cases and thus it need not be proven before the trafficking definition in s. 2 of the DDA 1952 can be invoked. The line of submission of the learned DPP, Dato Mohd. Dasuki was similar to the approach taken by the learned judges of the High Court and Court of Appeal in this case.

[63] As alluded to earlier, the appellants were charged for trafficking in dangerous drugs under s. 39B of the DDA 1952. The said s. 39B provides as follows:

> **39B Trafficking in dangerous drug.**
>
> (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia:
>
> (a) Traffic in a dangerous drugs;
>
> (b) Offer to traffic in a dangerous drugs; or
>
> (c) Do or offer to do an act preparatory to or for the purpose of trafficking in dangerous drug.
>
> (2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death.

[64] So, what is trafficking? Trafficking is defined by s. 2 of the DDA 1952 as follows:

> "trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug;

[65] As can be seen, manufacturing is one of the acts of trafficking. What constitutes as "manufacture" can also be found in the definition section of s. 2 of DDA 1952 which says:

> "manufacture", in relation to a dangerous drugs, includes:
>
> (a) The making, producing, compounding and assembling of the drug;
>
> (b) The making, producing, compounding and assembling a preparation of the drug;
>
> (c) The refining or transformation of the drug into another dangerous drug; and
>
> (d) Any process done in the course of the foregoing activities

[66] Although the DDA 1952 does not specifically state the ingredients to be proven when one is charged for trafficking, decisions of our apex court have shown that one of the main elements that needs to be established is the accused is in possession of the dangerous drugs. One of such cases is *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129; [2006] 3 MLJ 193, wherein Ariffin Zakaria FCJ (as His Lordship then was) had at p. 140 (CLJ); p. 201 (MLJ) stated the following:

> … In order to sustain a conviction for an offence under section 39B of the Act, there has to exist a positive finding of possession by the trial judge independent of the statutory presumption under section 37(d) of the Act and such a finding has to be unequivocal ...

[67] His Lordship had further stated that the mere act of carrying is not sufficient to constitute the offence of trafficking.

[68] The parties, as well as the learned trial judge had placed reliance on the case of *Lee Boon Siah*, *supra*. In that case, the accused persons were convicted for trafficking based on 'manufacturing'. However, we noted, in that case there was evidence adduced showing that the accused persons were caught in the act of manufacturing at the time of the police raid. The relevant passages are reproduced:

> [9] In the said factory, PW5 conducted a search at the lower floor of the said factory and found a brown metallic coloured Honda Odyssey car registration plate no. SDL 5443L. Next, PW5 and his team proceeded to the back door of the factory. When the back door was opened, PW5 found all the five accused persons. They were in a state of fright and their clothings were in disarray as if they had just completed carrying out some work. All the five accused persons were then handcuffed. After that, they were taken to the front area of the factory.

And the Court of Appeal explained the nexus in this manner:

> [30] Even more to the point, as correctly found by the learned trial judge, there was a nexus between the five accused persons and the dangerous drugs exhibits seized. The five accused were arrested in the factory premise. The five accused persons were actually arrested in the premise of the factory because there was a wall encircling the perimeter of the said factory. Tellingly, the clothes of the accused also had methamphetamine stains: t-shirt of the 1st accused; blue jeans pants brand name "Exhaust" of the 2nd accused: and shirt brand "Camel" of the 3rd accused. PW4 also confirmed that, apart from 2nd and 4th accused, "hand swab" of the right and left hand collected by PW9 from all the five accused persons at the factory contained methamphetamine. PW12 confirmed that the DNA profile of all the accused persons were found on the following items: underwear and toothbrush (1st accused); underwear (2nd accused); glove (3rd accused); cotton swipe (4th accused); and glove (3rd, 4th and 5th accused persons).

[69] The Court of Appeal in *Lee Boon Siah*, *supra*, had held that the manufacturing of the dangerous drugs in that case did not involve possession. However, it was clear from the facts of that case, not only that the appellants there were found and caught on the same floor where the machines were, the clothes they were wearing and their hands had stains of the same drugs found. There was therefore no doubt they were in control and custody of the said machines and hence, having possession of the drugs.

[70] As such, even though the Court of Appeal in *Lee Boon Siah*, *supra* held that the manufacturing of the drug in that case did not involve possession, the facts showed that the element of possession did exist in that case.

[71] The learned DPP had referred to another Court of Appeal decision in *Lim Son Heng v. PP* [2014] 1 LNS 414; [2014] 6 MLJ 109 to support his argument that possession need not be proven in manufacturing of dangerous drugs case as in that case the premises was opened with the key found on the body of the accused person and in the premises, dangerous drugs were found together with various utensils and tools which were suspected to be used for manufacturing dangerous drugs. So, even though there was no eyewitness who saw the accused in the act of making or producing the impugned drugs, the court still found him guilty of manufacturing.

[72] With due respect to the learned DPP, the accused in *Lim Son Heng*, *supra* was arrested as he was leaving the premises after locking the grille and the main door. When he was arrested, and when he opened the grille and the door of the premises, there was no one else in the premises and the drugs together with several illicit drug-making utensils were discovered in the unlocked main room of the premises. Therefore, the Court of Appeal found he had control, custody, knowledge and hence possession of the drugs. The Court of Appeal held *inter alia*;

> (2) There was no doubt the appellant had possession of all things inside the premises to the exclusion of others. The keys to the premises were recovered from him; the evidence of four witnesses identified him as the tenant of the premises … All the doors to the rooms in the premises were also unlocked showing that the appellant enjoyed complete custody and control of the place and of the items found therein. The evidence when taken together led to the conclusion that at all times the offending drugs were in the appellant's custody and control and the irresistible inference was that he had knowledge of the drugs. The prosecution had made out a case of actual possession … .

[73] In our view, *Lim Son Heng*, *supra*, is another case to illustrate that possession is still an essential ingredient in a case involving manufacturing of dangerous drugs and thus it needs to be proven before the trafficking definition in s. 2 of the DDA 1952 can be invoked. The general rule in our

A view is, for a person to be trafficking in dangerous drugs, he must have the drugs in his possession. Even though the DDA 1952 does not explicitly define "possession", earlier decisions of our courts have established that possession must be with *mens rea*, that the person must be aware of his possession, that he has the exclusive power to deal with the drugs.

B **[74]** On "possession", this court in *PP v. Denish Madhavan* [2009] 2 CLJ 209 at pp. 217 to 218 had stated the following:

> [17] The idea of exclusively features in the meaning of "possession" in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Liow Ngee Lim v. Reg.* [1955] 1 LNS 53:
>
> C
>
> > … it is often said that "possession must be exclusive". This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude
> D other persons from enjoyment of the property.
>
> > Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that "possession must be exclusive" is often due to
> E confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.
>
> [18] Thomson J, in *Chan Pean Leon v. Public Prosecutor* [1956] 1 LNS 17, said that "possession" for the purposes of criminal law involves possession itself – which some authorities term "custody" or "control" - and
> F knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in *Stephen's Digest* (9th edn, p.304), in which the exclusive element mentioned by Taylor J appears:
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal
> G with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> [19] Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established
> H is possession, not exclusive possession. So much for exclusive possession.

[75] Thus it is clear to our mind that trafficking cases require proof of possession with the exception of a few such as in cases of sale and supply of dangerous drugs as decided by this court in *PP v. Chia Leong Foo* [2000] 4 CLJ 649; [2006] 6 MLJ 705 at pp. 660-661 (CLJ); p. 717 (MLJ) as
I follows:

> It must be observed that *most of the acts that constitute 'trafficking" as defined in s.2 of the Act like, for example, keeping, concealing, storing, transporting and carrying dangerous drugs involve the prerequisite element of possession unlike, for instance, the sale and supply of dangerous drugs which need not necessarily involve possession as demonstrated by Pendakwa Raya v. Mansor bin Mohd. Rashid & Anor [1996] 3 MLJ 560.* It follows that a person cannot keep, conceal, store, transport or carry dangerous drugs within the meaning of 'trafficking' in the Act without being in possession of them. Proof of further facts to establish any one of these acts is therefore sufficient to make out a case of trafficking. Thus it is true, as the (then) Supreme Court observed in *Teh Geok Hock v. PP* [1989] 3 MLJ 162 (at p. 163), that '... the definition in the Act sounds artificial and not according to the ordinary meaning of the word "trafficking" which is normally understood to mean to trade in, buy or sell, any commodity, *albeit* often with sinister implication'. The offence is therefore complete upon proof of the relevant act that constitutes 'trafficking' as defined in s. 2 of the Act and the purpose of such act is not material. The weight of the dangerous drugs involved is not a determinative factor (see *Leong Siew Hoong v. PP* [1988] 1 MLJ 396). Personal consumption may be set up to explain the possession of the drugs (see *Cohen Lorraine Philis & Anor v. PP* [1989] 3 MLJ 289; *Ng Chai Kem v. PP* [1994] 2 MLJ 210; *Chow Kok Keong v. PP* [1998] 2 MLJ 337).
> (emphasis added)

[76] In another case of *Ong Hooi Beng & Ors v. PP* [2015] 1 LNS 63, the appellants were charged under s. 39B(1)(c) of the DDA 1952 with an offence of doing an act preparatory to trafficking in dangerous drugs, almost similar to the appeal before us. They were arrested during a raid on a factory under the style and name of Zmas Synergy Sdn Bhd which was suspected to be used as a clandestine drug processing laboratory. Their charge was for manufacturing of the drugs which is an act of trafficking by definition of s. 2 of the DDA 1952. All the appellants denied any involvement in drug processing. However, at the time of their arrest all of them were inside the factory where the drugs and drug manufacturing apparatus were found. Not only that, traces of methamphetamine were found on the appellants' fingernails, hair and clothing. And they were not able to explain how those traces came to be found there. The Court of Appeal agreed with the trial judge that the traces of methamphetamine found on the appellants' fingernails, hair and clothing indicated that they had knowledge of the drugs and this evidence was compelling evidence which showed their active involvement in processing the drug at the factory. In other words, they had *mens rea* possession.

[77] Looking at the DDA 1952 further, the word "manufacturing" or the definition of "manufacturer" under s. 2 of the DDA 1952 is used as a verb. Verbs have traditionally been defined as words that show action or state of being. What it means, if a person is charged with manufacturing the dangerous drugs, it is the duty of the prosecution to provide that at the time

of the police raid, the accused person is in action, namely, is engaged in the acts of "manufacture" as defined by s. 2 of the DDA 1952; for example, he was in the act of producing or making or refining the drugs. The evidence of such act must be there. This was what happened in *Ong Hooi Beng*, *supra*, and even *Lee Boon Siah, supra*.

[78] Generally, we are of the view that possession is an essential ingredient to be proven for manufacturing cases. But of course there will always be exceptions depending on the facts and circumstances of a particular case. For example, when an accused person is caught giving instruction to others to process the drugs when he himself is not having the drugs on his body or not touching the machine. His presence there is not mere presence but for the purpose of manufacturing the drugs. The nexus is there, or, as in the case of *Lim Son Heng*, *supra*, even though the accused was not caught in action, based on the facts and circumstances of the case, he was still found to be in possession of all things inside the premises.

[79] Coming back to the instant appeal. Had trafficking been proven here? The premises of the first charge was a double-storey shop house. The drugs and the apparatus were found on the ground floor of the premises. That was not in dispute. What was in dispute was where the appellants were when the police raided the premises. The prosecution said they were arrested at the ground floor. The defence's story was they were at the first or upper floor.

[80] However, having perused the notes of proceedings, we found that the evidence of the prosecution witnesses on this was not convincing. SP14 in his police report marked as D184 had in para. 3 stated that they went to the premises no Lot 185-1, Jalan Haruan 5/6, Pusat Komersial Oakland II, Seremban.

> Saya telah memecah (1) pintu grill (Berscan) dan (2) pintu kayu sebelum masuk ke ruang hadapan premises tingkat (1). Saya dapati ada (2) lelaki Cina berlari menuju kearah saya.

[81] He further stated in para. 6 of the report that after arresting and searching the bodies of the two appellants:

> saya seterusnya menjalankan pemeriksaan di bahagian **bawah** rumah kedai tersebut bermula dari bahagian hadapan, tengah dan belakang.

[82] However, during the trial, SP14 said the appellants were arrested at the ground floor of the premises. During examination-in-chief, SP14 said he had instructed SP33 to inspect the first floor and that the appellants were arrested at the ground floor. He further contradicted himself when during cross-examination he denied saying he had instructed SP33 to inspect the first floor.

[83] SP33 however in his evidence said SP14 did instruct him to inspect the first floor and he did together with other team members including SP34. A

[84] But SP34 in his evidence said he never went to the first floor of the premises, instead he was asked to guard the back of the premises. He even agreed with the defence's suggestion that SP33 had lied when SP33 told the court that SP34 went upstairs together with SP33. B

[85] We were of the view that where the appellants were actually arrested in this case was extremely important to appreciate, as unlike the factual matrix in *Lee Boon Siah*, *supra*, it is doubtful whether they actually had control and custody of the items found on the ground floor if they were caught or arrested on the first floor. C

[86] The evidence in D184 and the oral evidence of the three said witnesses clearly contradicted each other and this contradiction was not mere contradiction but material contradiction as the lives of the appellants hinge upon the evidence. Our curiosity was further raised as D184 was never produced by the prosecution but the defence. What was it that the prosecution was trying to hide? When SP14 made his police report, D184, he was definitely aware of the existence of the first floor (tingkat 1) and the ground floor (tingkat bawah). This was in stark contrast with his evidence in court. D E

[87] The original charge itself read "Lot 185-1" which as confirmed by SP12, the landlord, as the address of the first floor of the said premises. This address was amended to "Lot 185" only after the prosecution had called 16 witnesses.

[88] In the light of the contradictions inherent in the prosecution evidence, we could not but agreed with learned counsel for the appellants that there was grave doubt on the question of whether the appellants were arrested on the first or ground floor of the said premises and the benefit of the doubt ought to be resolved in favour of the appellants. Or course we were aware that there will always be discrepancies and contradictions in a case. However, in light of D184 and the sudden amendment to the charge, the evidence of the prosecution witnesses must be treated with caution and looked upon with suspicion. We adopt with approval what Vincent Ng JC (as he then was) had said in *PP v. Lee Eng Kooi* [1993] 2 CLJ 534; [1993] 2 MLJ 322: F G

> In such a case where the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the court will be left with no reliable and trustworthy evidence upon which a conviction of the accused might be based. H

I

[89] With due respect to the learned trial judge, we found Her Ladyship's mind was clouded with her view that it was unnecessary for the prosecution to prove possession in case of manufacturing. Hence, she had clearly failed to give proper evaluation, in fact no evaluation at all, to the material contradiction of the evidence of the material witnesses especially SP14, SP33 and SP34 on whether the appellants were arrested on the ground or first floor of the premises which in our view was relevant to the question whether the appellants had control and custody of the dangerous drugs and the apparatus found on the ground floor. Those can clearly be seen in para. 50 of Her Ladyship's grounds of judgment as follows:

> [50] Dengan demikian Mahkamah memutuskan hujahan pembelaan mengenai percanggahan keterangan di antara saksi-saksi pendakwaan berkenaan fakta bahawa kedua-dua OKT ditangkap di tingkat bawah adalah tidak perlu dipertimbangkan.

[90] Our view is clear. The case of *Lee Boon Siah, supra*, and the case of *Ong Hooi Beng, supra* can readily be distinguished from the instant case. In those two cases, the present of the drugs on the appellants' persons was a key element which provided the nexus between the appellants and the preparatory act of processing the drug. In consequence, they were arrested while they were engaging in the act of manufacturing. While in the instant appeal, there were no traces of drugs found on the persons of the appellant at the material time when they were caught. There were also no traces of drugs on their nails or clothes they were wearing then. There was also no evidence of the processing of the drugs found then, not even by the chemist. Therefore, we could not find any nexus between the appellants and the act of manufacturing.

[91] It was the version of the first appellant that he had rented the premises in the first charge to start a business dealing with CCTV and alarm system. The second appellant was his business partner. However, due to the rough start-up of the business, the first appellant had decided to sub-rent the ground floor to his friend by the name of Ah Gu, Ah Kam and Ah Weng. Not long after that Ah Gu had sought the help of the appellants and some other friends to move some machines into the shop; to be used to manufacture "ubat kuat lelaki".

[92] There was evidence of SP4 which confirmed that the machines could not be carried into the building by merely two persons without the help of any forklift. There were multiple fingerprints of unknown individual found on several machines which could not be traced in the police database. There were also the fingerprints of one Daniel Yeng Lin Saifullah on lifting card, J5, on the machines marked as A2 and A3. Besides, two cigarette butts recovered from the ground floor contained DNA of "Male 1".

[93] The evidence laid down above pinpoints the access possibility by the third party to the ground floor. It is trite that the burden is on the prosecution to exclude access of the said ground floor by others to prove that the appellants were exclusively in custody and control of the dangerous drugs and the machines found on the ground floor. The prosecution had failed to establish such evidence when the onus is not on the defence to prove possibility of access by others, but on the prosecution to exclude such possibility. The burden of proving its case at every stage lies on the prosecution. The only task of the accused is to raise a reasonable doubt as to the truth of the prosecution's case. See: *Mohan Singh Lachman Singh v. PP* [2002] 3 CLJ 293; [2002] 3 MLJ 291.

[94] We therefore agreed with learned counsel for the appellants that the fact that the appellants were seen carrying a few of the said machines into the premises explained how their fingerprints were found on some of the machines. But there were many of others too. Therefore that could not point to an irresistible inference that the appellants manufactured dangerous drugs in the premises. Their conduct of running towards the police upon arrest also in our view did not point to their guilt as if you do something wrong, you would definitely run away from the police not running towards them. To top it all off, there was a doubt as to where actually the appellants were arrested. Not only that, the appellants were "clean" at the time of the arrest. No drugs or traces of drugs were found on their person.

[95] We could not find any nexus to connect the appellant with the act of manufacturing. To reiterate, in our view, whether or not possession is necessary ingredients to be proven in a case involving manufacturing of dangerous drugs, would depend on the facts and circumstances of a particular case. In this instant appeal based on the facts and circumstances on when and how the appellants were arrested, we were of unanimous view that possession needs to be proven. Unfortunately, the prosecution in our view had failed to do so. The courts below in our view had misdirected themselves by way of non-directions in not considering the ingredient of possession.

[96] On the totality of the evidence before us, we found that the conviction on the first charge on this ground alone was unsafe. We need not consider the other issues. We therefore allowed the appeal of both the appellants on the first charge and quashed the conviction as ordered by the High Court and affirmed by the Court of Appeal, and set aside the sentence of death. Consequently, we ordered both the appellants to be acquitted and discharged on the first charge.

[97] On the second charge, for the purpose of appeal before us, the second charge was only against the first appellant. It was the learned trial judge's finding that the premises of the second charge was used to store the drugs manufactured in the first charge:

A (86) … bahawa premis 861 digunakan untuk menyimpan (storing) dadah yang dirampas ataupun yang diproses di premis no. 185.

…

(124) … dengan jenis dadah yang sama yang diproses di premis rumah kedai dan yang dijumpai di rumah 861 adalah keterangan yang sangat relevant dan kukuh bahawa dadah-dadah yang diproses oleh OKT1 dan OKT2 disimpan di premis 861.

[98] Learned counsel for the first appellant submitted that as premises in for the second charge was purportedly used to store the drugs purportedly manufactured by the first appellant, if the first charge against the first appellant fails, the second charge must also fail and the second charge against the first appellant must be reduced to mere possession.

[99] We found merit in this argument. Especially so when there were other occupants in the house at the time of the raid. Hence, on the second charge, we quashed the conviction, set aside the sentence of death under sub-s. 39B(2) against the first appellant and substituted for an offence punishable under sub-s. 12(3) of the DDA 1952. After taking into consideration the mitigation put forward by the first appellant, we sentenced the first appellant to imprisonment for a period of five years with effect from the date of arrest.